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IN THE

Supreme Court of the United States

October Term, 1978
No. 78-759

DAVID H. LEROY, Attorney General of Idaho; and TOM D. MCELDOWNEY, Director of Finance of the State of Idaho,

Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,

Appellee.

On Appeal From the United States Court of Appeals for the Fifth Circuit

Brief of Amici Curiae States of California, Montana, North Carolina and Vermont in Support of Appellants

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The State of California, joined by the States of Montana, North Carolina and Vermont, respectfully submits that the ruling of the Court of Appeals on the question of jurisdiction was incorrect, and, if not reversed, could have a substantial adverse impact on state governments generally.

Specifically, these amici submit that an exercise of a purely governmental power cannot be characterized as "doing business" in another state and cannot support a finding of personal jurisdiction over a state officer located outside the forum state.

Interest of These Amici

The primary concern of these amici arises from the potential consequences of a rule which would require a state to appear in a foreign state to defend the validity of its legislative or administrative action in either state or federal courts located in the foreign state.

These amici recognize that a state's exercise of its governmental powers may be reviewed in a federal court located within the state by means of the doctrine of *Ex parte Young* (1908) 209 U.S. 123; that is, that the state governmental act which is the subject of the action may be regarded as the act of the state's agent, even though he is merely following the dictates of his state's Legislature in his action; the objection arises when this fictitious doctrine is used to create jurisdiction in a court located outside the state.

Similarly, these amici also recognize that a state may subject itself to jurisdiction in a distant forum by physical presence in the forum (*Hall v. University of Nevada* (1972) 8 Cal.3d 522, 503 P.2d 1363, cert. den., 414 U.S. 820; *People v. Steeper* (1957) 12 Ill.2d 204); or by engaging in proprietary activity within the forum (*Parden v. Terminal R. Co.* (1964) 377 U.S. 184).

The question presented here, however, does not involve proprietary activity, nor an act done in the forum state. This case involves a purely governmental activity done entirely within the boundaries of the foreign state,

but which has alleged consequences in the forum state. The effect of the Fifth Circuit decision is to create an avenue for review of the validity of one state's laws in courts located in another state, a practice which would greatly diminish the independence of the states.

ARGUMENT

One of the two alternate bases for personal jurisdiction found in this case rests upon those provisions of rules 4(d)(7) and 4(e) of the Federal Rules of Civil Procedure, which measure the scope of personal jurisdiction of U.S. district courts by the scope of jurisdiction afforded to state courts by the laws of the state in which the courts are located. Accordingly, the holding extends beyond the question of federal court jurisdiction alone.

The Texas statute defining personal jurisdiction for Texas courts authorizes assertion of personal jurisdiction over nonresidents to the limits of due process. (Tex. Rev. Civ. Stat. Ann. art. 2031(b) (Vernon).) The Fifth Circuit decision, therefore, holds that an officer of one state may be sued in another state if his performance of duty within his home state can be characterized as "doing business" within the forum state.

These amici believe that the mere act of communicating an inquiry or response across a state border cannot supply a jurisdictional basis for extraterritorial review of state governmental action.

By state "governmental action", we mean to encompass such activity as the enactment of state constitutional and statutory provisions, the promulgation of administrative regulations, guidelines, or policies, and the making of decisions pursuant to such provisions of law or policy. These matters, we submit, are best

reviewed in courts located within the boundaries of the defendant state.[1]

The Fifth Circuit correctly noted that the limits of extraterritorial personal jurisdiction are based upon questions of fairness of subjecting a defendant to suit in a distant forum. Amici submit that, in the context of a federal system of independent sovereign states, it is not fair to compel a state officer to appear in another state to defend a purely governmental act. It is obvious that both the state and federal courts of any state are trained primarily in the laws of the forum state; to the extent that the law of another state differs, it will be strange and unfamiliar to the forum, and it is only human to be suspicious of that which is unfamiliar. A plaintiff seeking to invalidate a regulatory act on constitutional grounds should be required to maintain his action in those courts which will be most familiar with the system of law of which the challenged act is a part. Permitting him to go elsewhere invites "forum-shopping" of a sort in which the forum of choice is the least informed.

The Court of Appeals attempted to analogize the instant case to cases which have applied the "doing business" test for jurisdiction over a nonresident defendant by saying, "Idaho's 'business' is to regulate. It was conducting that business in Texas." (*Great Western*

[1]Amici recognize that litigation between private parties can raise issues which require a court to determine the constitutionality of a law of another state. Such situations are unavoidable and quite obviously do not present the same problem for state governments as are present here.

United v. Kidwell (1978) 577 F.2d 1256, 1268.) The premise is patently incorrect. Government is not business. To say that governing is the "business" of a state is as sensible as saying that eating or sleeping is the business of a human being. Idaho's activity and its purpose is regulation, but regulation is not business and cannot be made so by slogan. The distinction between governmental functions and proprietary activities of government has long been recognized.

This Court's most recent analysis of the problem of minimum contacts was in *Kulko v. Superior Court of California, Etc.* (1978) .... U.S. ...., 98 S.Ct. 1690. In that case, the court observed the distinction between the consequences of commercial activity on the one hand and personal relations on the other. (98 S.Ct. at 1699.) The same distinction exists with respect to purely regulatory activity by a state. Unless a state engages in a proprietary activity or "purposefully avails itself of the privilege of conducting activities within the forum State," *Hanson v. Denckla* (1958) 357 U.S. 235, 253, it should not be forced to defend itself in a foreign state.

Conclusion

For the foregoing reasons, the States of California, Montana, North Carolina and Vermont respectfully submit that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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